Supreme Court, U.S.
FILED
MAY 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1702

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

GARY C. LANCASTER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the issue raised in the Petition for Certiorari is properly before this Court?

2. Whether the facts in this case give rise to a traditional claim under the Federal Employers' Liability Act, 45 *U.S.C.* § 51, hereinfafter called "FELA", and therefore, do not raise the issue presented in the Petition for Writ of Certiorari?

3. Whether an employee who is assaulted and battered as a result of the negligence of the railway is prevented from receiving the award the jury determined compensated him for his injuries pursuant to the FELA simply because the assaults and batteries were perpetrated by supervisory personnel of the railway?

4. Whether the proper inquiry to determine if the Plaintiff has stated a cause of action under the FELA is to determine if the Plaintiff has stated a claim for "negligence" as that term is defined in the FELA?

5. Whether, under the argument advanced by the Petitioner, the Railway Labor Act, 45 *U.S.C.* § 151, hereinafter called "RLA", is needlessly brought into conflict with the Seventh Amendment to the Constitution of the United States of America?

IN THE ALTERNATIVE

6. Whether, assuming the RLA applies to this case, *Lancaster* falls within the *Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977) exception to the exclusive remedy requirements of the RLA?

PARTIES

Respondent, Gary C. Lancaster, is an individual Citizen of the United States of America. Respondent is hereinafter referred to as "Lancaster".

Petitioner, Norfolk and Western Railway Company, a Virginia Corporation, is a subsidiary of the Norfolk Southern Railway Company. Lancaster is uninformed of the Petitioner's related interests, if any, that may be required to be disclosed pursuant to Rule 28.1. Petitioner is hereinafter referred to as "N & W".

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Gary C. Lancaster, Respondent, respectfully submits this Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit requesting that the petition be denied.

OPINIONS BELOW

The petition adequately sets forth the opinions of the lower courts in its Appendix. Reference to the opinions below in this brief shall be to the appropriate page of the Appendix contained in the petition and designed as "App. ___".

JURISDICTION

The petition adequately sets forth the jurisdictional grounds of this Court.

CONSTITUTION

The Seventh Amendment to the Constitution of the United States of America states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATUTES

The petition adequately states the pertinent provisions of the RLA, 45 U.S.C. §§151(a) and 152.

The petition adequately states section 1 of the FELA, 45 *U.S.C.* §51.

Section 5 of the FELA, 45 *U.S.C.* §55 states in pertinent part:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act [45 USCS §§51, et.seq.], shall to that extent be void: . . .

STATEMENT

1. AT TRIAL, THE FOLLOWING FACTS WERE INTRODUCED INTO EVIDENCE:

Gary C. Lancaster, age 39 at trial, began working for the N & W in 1967. Prior to being employed by the N & W, Lancaster had acquired considerable mechanical and welding skills. Lancaster enjoyed his work at the N & W and was a friendly out-going person who performed his work well and participated in employee recreational activities. He was an average, normal worker, husband and father of two minor children [R.3B, pp.3-26; R.2, pp.273,337,338; R.1, pp.97,133,146].

In 1975 Lancaster was working in the railroad's locomotive shop in Decatur, Illinois. Lachrone, a short-tempered foreman in the shop who had once been disciplined for roughing up a worker, became angry at Lancaster and several other workers who Lachrone thought were soldiering on the job. After flipping over a table on which one of the workers (not Lancaster) was sleeping, and smashing a bench, Lachrone grabbed a broom handle, approached Lancaster in a menacing fashion, screamed at him for about 15 seconds, and shook the broomstick in his face. Lancaster bid out from Lachrone's supervision and complained about the incident to his union, but no action was taken [App. 2a].

The incident upset Lancaster abnormally. He thought people were following him, thought his phone was tapped, felt that the pressures of working for the railroad were too much, and went to Georgia to look for a new job, but after a couple of months his distress subsided and he went back to the N & W. He was assigned to another foreman, Funderburk, who liked to "goose" workers, pull their hair, and hit them on their arms. He also did these things to Lancaster, over Lancaster's protest. This behavior culminated in an incident in 1976 when Funderburk twice stuck his hand down the back of Lancaster's pants—once squeezing a buttock, the other time sticking his finger into Lancaster's anus. Lancaster became very upset, thereafter had trouble working, lost control of his emotions, consulted a doctor, and on the doctor's advice took a leave of absence.

The doctor diagnosed Lancaster as suffering from anxiety [R.3B, pp.59-62; App.2a].

Lancaster returned to work early in 1977 and worked uneventfully until an incident in 1979 involving another supervisor, Boyd. Lancaster and another worker were repairing a locomotive under Boyd's supervision when Boyd picked up a sledgehammer—though as a supervisor he was not supposed to wield a sledgehammer, and he did not have on safety gloves which are required to prevent greasy sledgehammers from slipping from a worker's hands—and swung it at a pin that was stuck. The sledgehammer flew out of Boyd's hands when he completed his swing, and struck Lancaster. Although only bruised, Lancaster became very upset because he thought Boyd had thrown the sledgehammer at him ("I swear before God the man throwed that sledgehammer, because when he throwed it, it went right where my head was back, and when I moved back is the only thing that saved my life") [R.3B, p.p.68; R.2, pp.285-289 and 294-296; App.2a,3a].

After the incident with Boyd, Lancaster developed a fear of sharp objects, of tools and many other things. He avoided his family and friends and had urges to hurt himself [R.3B, pp.73,74,83].

Two months later Lancaster found himself working under another hot-tempered supervisor, like Lachrone—Tynan, a burly six-footer, who while fondling a pickax handle told Lancaster that if he didn't "keep on the job and do it right, I'll put your name on it." About a week later Lancaster happened to deliver some papers to Tynan that were folded. Tynan said, "I told you not to fold the papers," to which Lancaster replied that he had not folded them, they had been folded when he had received them to give to Tynan. Tynan, enraged, charged Lancaster with pickax handle in hand ("I turned around, and here's Jack [Tynan] coming at me, and I says, don't Jack, don't") and struck the door frame over Lancaster's head with the han-

dle ("I heard his pickax handle hit the door frame, and I turned around, and there's Jack, and he wasn't smiling"). Lancaster became even more upset than after the previous incidents. Indeed his mental condition deteriorated rapidly [App.3a].

Lancaster saw things that were not real. He was confused, in an internal rage, screaming, could not control his emotions or do anything properly and was unable to explain how he felt [R.3B, pp.79-85]. His doctor referred him to a psychiatrist who, two weeks after the incident with Tynan, diagnosed Lancaster as schizophrenic [App.3a].

Except for treatments, Lancaster did not go outside his house after July 5, 1979. Lancaster went from window to window looking out to see if anyone was watching him. Lancaster was scared of everyone, including his friends and neighbors. He stayed in an internal rage. He was unable to do any tasks in the home. He stayed awake all night watching out the windows. He slept on the couch briefly during the day. Lancaster was clumsy and uncoordinated. His hands did not follow what his mind wanted to do. He had to stop and pre-plan his every move, and he still was not able to move correctly. Lancaster had thoughts of hurting himself and his friends. Lancaster was verbally and physically abusive to his wife and children, would not communicate or talk to strangers, and fell into a deep depression. He was no longer able to drive because he felt that he would injure himself or someone else. Lancaster could not reason out problems or do mechanical tasks. He exhibited absurd behavior, was unpredictable, without warning became violent, depressed and suicidal. Lancaster was not the same person he was before the incident with Tynan [R.3B, pp.84,86,87,89-103; R.2, pp.343-353].

Schizophrenia is a psychosis and is a general classification for the most serious debilitating mental illness. The schizophrenic's personality becomes so disorganized that

he becomes unable to function in an effective way in everyday life. The schizophrenic loses his ability to interpret reality and the events around him. He has gross distortions of the perceptual process and hears and sees things that are, in fact, not there. The schizophrenic has a difficult time in the thought process and finds it difficult to maintain a rational train of thought, jumping from subject to subject. Schizophrenia can cause serious disruptions in the person's affect. For example, a schizophrenic may show no emotion in a situation which would normally cause a strong emotional response while he may show a strong emotional response to a situation that should not cause an emotional reaction. A schizophrenic may also show an inappropriate emotional response such as laughter at a sad event, or crying and depression at a joyous event [R.2, pp.187,189; R.4, pp.616-618].

Doctor Henebry, a pyschiatrist, diagnosed Lancaster as suffering from schizophrenia, a schizo-affective type which means a type of schizophrenia with emphasis on thought disorder and includes a major affective component, or serious mood disorder. Doctor Henebry testified that Lancaster's illness is not curable, and that he will never be able to work at the N & W or in any other employment. Doctor Henebry testified that Lancaster will require medical supervision for the rest of his life; that Lancaster has permanent mental pain and suffering from his illness; that Lancaster needs medication for the rest of his life; and, even with medication, Lancaster could not return to work [R.3C, pp.443-439].

Doctor Sunderland, a psychiatrist, testified that in addition to chronic schizophrenia, Lancaster suffers from paranoia and aggraphobia, both of which are related to Lancaster's schizophrenia. He said paranoia is extreme suspiciousness where a person feels other people are out to harm, poison, kill or somehow get him. Aggraphobia is the fear of open places which limits a person to wherever he lives and usually manifests itself by his being afraid to

go out of his house [R.2,pp.181-184,190-192]. Doctor Sunderland testified that Lancaster's illness has periods of deterioration and periods when it is better. He said, however, Lancaster will never be cured and will never be able to work. Doctor Sunderland testified that Lancaster suffers mental pain and anguish from his illness and that Lancaster will require medical supervision and medication for the rest of his life. He said that Lancaster's medication has side effects which range from a dry mouth to severe neurological symptoms such as a twisted neck, thick tongue, the inability to swallow, muscle contractions and tremors and can cause shock sufficient to kill him. He said that the medication helps only to a certain degree and never provides a very good remission for chronic schizophrenia [R.2, pp.199-202 and 229-232].

Doctor Harrison, a psychologist, testified he diagnosed Lancaster as suffering from schizophrenic disorders, undifferentiated type, chronic with acute exacerbation with strong paranoid and affective features [R.4, p.613]. Doctor Harrison testified that when a person suffers the severe problems that Lancaster has it is not unusual for him to be reluctant or afraid to take medication he needs. For Lancaster, this fear of medication is a real complication. It is not uncommon for a schizophrenic to have to be hospitalized during the more florid phase of the disease [R.4, pp.634,670-672,675]. Doctor Harrison testified that Lancaster would not act violently towards his bosses or supervisors because he is too afraid of them. From time to time Lancaster will act out his hostilities on his loved ones, his wife and children [R.4, pp.677,678].

All three expert witnesses agreed that the incident with Tynan, coming on top of the earlier incidents, had precipitated a descent into madness from which Lancaster will never recover [App.4a].

2. THE PETITIONER'S "STATEMENT", 2., PAGE 6 OF THE PETITION ADEQUATELY RELATES THE PRO-

CEDURAL HISTORY OF THIS CASE IN THE TRIAL COURT.

3. THE PETITIONER'S "STATEMENT", 3., PAGE 7, MISSTATES THE OPINION OF THE COURT OF APPEALS IN SEVERAL CRITICAL AREAS.

In illustrating the line between a tort actionable in court and an employment dispute actionable only in a grievance and arbitration proceeding, the court identified three categories of cases.

The Petitioner properly stated the first category the court of appeals identified as follows:

> The first category includes those cases in which a classic 'unauthorized touching' of plaintiff's person takes place (such as a supervisor negligently dropping a brick on an employee's foot) and in which there is no possible issue concerning the meaning or application of the collective bargaining agreement (App., *infra*, 8a-9a). The court held that claims in this category may plainly be brought under the FELA (*id.*) [Petition pp.6,7].

The Petitioner properly stated the second category the court of appeals identified as follows:

> The second category includes those cases which involve classic labor disputes (such as whether an employee had been paid the wage fixed under the collective bargaining agreement) (App., *infra*, 10a). The court of appeals held that, regardless of how an employee characterizes such a dispute, it is one which 'Congress would have wanted . . . resolved by the arbitrators [under the RLA] and not by a state or federal court [under the FELA]' (*id.*) [Petition p.7].

The Petitioner, however, totally misstated the third category of cases the court of appeals identified [Petition p.7].

The court of appeals identified the third category of cases as follows:

> The difficult cases of preemption involve what we may term 'nonphysical' torts. More and more states allow suits for wrongful discharge when a worker is fired for a reason that is contrary to public policy (such as giving testimony against his employer), and for intentional infliction of emotional distress even when the act that caused the distress was firing the plaintiff. Invariably courts asked to decide whether either type of suit is preempted by the Railway Labor Act hold that it is. [citations omitted]. The courts see such suits, rightly or wrongly, as end runs around the Railway Labor Act's policy of channeling employment disputes to arbitration. But the courts do not state the issue as one of supersession by the Railway Labor Act of the Federal Employers' Liability Act, because no court (probably not even the court in *Yawn*, which apparently conceived the case before it as a simple negligence case about improper working conditions) has thought that any of these new torts arise under the FELA. Even firing a worker in retaliation for bringing an FELA suit against his employer does not violate the FELA. [Citations omitted]. If it violates anything, it violates state law. [App.10a,11a].

The court of appeals found that this case fits into the first category of cases, traditional FELA actions for physical torts, and not in the "third" category of cases the Petitioner invented. The court stated:

> The incidents that culminated in the pickax-handle episode which precipitated Lancaster's psychosis were assault (Lachrone), battery (Funderburk), battery or negligent infliction of per-

> sonal injury (Boyd), and assault (Tynan). All are conventional torts involving offensive physical contact or, in the case of assault, placing the victim in apprehension of an imminent such contact. [App.12a].

The Petitioner further misinterprets the opinion of the court of appeals on page 11 of the Petition. The court of appeals did not premise its decision on a theory that Congress did not mean what it said in drafting the RLA, and this court erred in its decision it reached in *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711 (1945). The court of appeals did note that this court's dictum in *Burley*, if carried to its logical conclusion, would result in the RLA repealling the FELA. *Burley*, however, was construing the individual worker's rights under the RLA and was not attempting to reconcile the RLA and the FELA. The court of appeals simply found that Congress did not intend to repeal the FELA when it enacted the RLA, and that is the premise upon which the court of appeals based its decision [App.10a].

SUMMARY OF ARGUMENT

The issue stated in the Petition for Writ of Certiorari is not properly before this Court. The collective bargaining agreement (if one existed) was not offered into evidence. This Court has no basis in the record upon which to decide the issue.

Lancaster is a FELA suit based upon traditional FELA torts. It does not raise the issue the Petitioner seeks to bring before this Court. Each of the torts committed by the Defendant, two assaults and two batteries (or one battery and one simple negligent contact) separately, are sufficient basis to state an actionable FELA claim.

Petitioner's argument that an employee injured as a result of being assaulted and battered by reason of the

railway's negligence should be precluded from receiving his award simply and solely because the perpetrators were supervisory personnel of the railway is neither logical nor supported by the case law.

In order to determine whether the RLA or the FELA applies to a set of facts, the test is whether the Plaintiff can state a claim under the FELA. In order to state a claim under the FELA, an injury causing event must be a result of "negligence" as defined in FELA.

The Petitioner's argument needlessly brings the RLA into conflict with the Seventh Amendment by eliminating the injured employee's right to a trial by jury in the traditional common law torts encompassed in the FELA.

IN THE ALTERNATIVE,

Assuming the RLA applies to the *Lancaster* case, the facts are so "outrageous" that they come under the *Farmer v. Brotherhood of Carpenters and Joiners, Local 25, infra*, exception to the exclusive remedy requirements of the RLA.

This case arises premised upon well-settled legal principals properly applied by the district court and the court of appeals and there is no issue which need be resolved by this Court. Lancaster requests that the Petition be denied.

REASONS FOR NOT GRANTING THE PETITION

I. The Issue Stated In The Petition For Writ of Certiorari Is Not Properly Before This Court.

Petitioner contends the sole issue before this Court is:

> Whether the court of appeals erred in holding that a claim solely for emotional injuries is actionable under the Federal Employers' Liability

> Act, 45 *U.S.C.* §51, where assault and battery are alleged, but where the alleged sources of the emotional injuries were workplace disputes with supervisors subject to mandatory grievance procedures that had been initiated by the employee pursuant to the Railway Labor Act, 45 U.S.C. §151. [Petition p.(i)].

In support of that stated issue, Petitioner argues outside the record in this cause. The collective bargaining agreement was never offered into evidence at trial. The Petitioner, inventing an agreement, states that there was a collective bargaining agreement signed by a Union representing Lancaster, that the work performed by Lancaster was undertaken in accordance with the terms of that agreement and that conditions of employment for Lancaster are covered by that agreement. Whether such an agreement existed or what its terms and the conditions of employment may have been simply are not of record in this case.[1] The thrust of the Petitioner's argument, however, is that the collective bargaining agreement arguably covers the assaults and batteries committed against Lancaster and, therefore, are subject to the mandatory grievance procedures of the Railroad Labor Act, 45 *U.S.C.* §151. Without the collective bargaining agreement to review, the issue is not properly before this Court. *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 32 L.Ed.2d 95, 92 S.Ct. 1562 (1972). *Miller v. Aviron*, 384 F.2d 319 (D.C.Cir. 1967). Without the collective bargaining agreement in the record, this Court has no basis in the record upon which to determine its effect, if any.

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[1] As shown by the record in this case whether there was a collective bargaining agreement or what its terms and conditions may have been was totally insignificant to Lancaster's FELA claim, and the Petitioner's defense thereof. Neither party introduced such agreement nor relied upon the protection of its terms.

ASSUMING, IN *ARGUENDO*, that this issue is properly before this Court. Lancaster offers the following additional reasons for not granting the Petition for Writ of Certiorari.

II. The Facts In This Case Give Rise To A Traditional FELA Claim and, Therefore, Do Not Raise The Issue Presented In The Petition For Writ of Certiorari.

The facts in this case do not present the issue that the Petitioner seeks to bring before this Court. This case is a traditional FELA action for assault, battery and (as the court of appeals found) simple negligence. All of which are traditional FELA tort theories.

The court of appeals found that it was far more likely that Boyd was merely careless (negligent) when the sledgehammer flew out of his hands striking Lancaster [App.20a]. Boyd was not authorized to use the sledgehammer, and he was not wearing safety gloves which prevent sledgehammers from slipping. There were no disputes between Lancaster and Boyd either prior to or after the sledgehammer struck Lancaster [App.20a; R.3B, pp.63-72]. If the sledgehammer had broken Lancaster's leg, instead of his ability to think logically and rationally, there would be no question that this case was proper under the FELA. There is no theoretical distinction in the responsibility for either type of injury. Absent a dispute concerning rates of pay, rules, or working conditions or out of interpretation or application of agreements covering rates of pay, rules or working conditions, the RLA does not apply. [45 *U.S.C.* §151(a)].

The court of appeals found that "Funderburk's goosing" of Lancaster was not related to Funderburk's supervisory duties; it was the pure expression of perversion, infantilism, bad taste, or a combination of these things [App.20a]. The case went to the jury on the theory "that the railroad was negligent in failing to prevent its employees from committing a series of intentional torts against Lancaster ('direct negligence')" [App.20a]. The Court found that

"There was enough evidence of a pattern of supervisory abuse to allow a rational jury to infer that a reasonably careful railroad management... would have gotten wind of it and done something to stop it" [App.22a]. Indeed, Funderburk's "goosing" activities were disclaimed by the N & W at trial. They do not constitute employer-employee disputes over the interpretation of application of the collective bargaining agreement, the work rules or conditions of employment. The negligence of the N & W did not arise vicariously by any act of Funderburk, but was its own direct negligence. Certainly, the N & W should not be allowed to claim that its own direct negligence was a minor dispute over the interpretation of application of a collective bargaining agreement, work rules or conditions of employment.

The court of appeals found that the incidents with Tynan and Lachrone "arose from an employment dispute, for these supervisors were expressing their dissatisfaction with Lancaster's performance of his job" [App.12a]. However, the court of appeals found that "no contention is or could be made that inadequate performance would justify the assaults on Lancaster" [App.12a]. There would be "no issue of interpretation of the collective bargaining contract" to arbitrate [App.12a]. "The employment context is wholly incidental" [App.13a]. Thus, these incidents are not even "arguably" governed by the RLA.

The Petitioner describes the injuries to Lancaster as "emotional injuries". The injury Lancaster suffered is a schizophrenic thought disorder, which among other things, deprives Lancaster of the ability to think rationally and in a logical manner. Is the breaking of Lancaster's ability to think rationally and in a logical manner different from the breaking of a bone in his leg which prevents its use? There is no question but that the court of appeals was correct when it found "Arbitrators have no particular competence to determine causality and assess damages in cases of serious personal injury, whether physical or mental...

thus making it even clearer that arbitration would have no advantage over adjudication in this case" [App.12a, 13a].

Considered in light of all the facts adduced at trial, this case simply does not raise the issue the Petitioner brings before this Court. Each incident standing alone is sufficient basis for liability of the N & W under the FELA.

III. An Employee Who Is Assaulted And Battered As A Result Of The Negligence Of The Railway Is Not Prevented From Receiving The Jury-Awarded Damages Simply Because The Assaults And Batteries Were Perpetrated By Supervisory Personnel Of The Railway.

It has long been settled by this Court that assaults and batteries contribute actionable negligence under the FELA. *Jamison v. Encarnacion*, 281 U.S. 635, 50 S.Ct. 440, 74 L.Ed. 1082 (1930).[2] Indeed the Petitioner does not argue to the contrary. A railroad has been held liable to an injured worker when its negligence causes the worker to be assaulted and battered by a third party, *Lillie v. Thompson*, 332 U.S. 459, 68 S.Ct. 140, 92 L.Ed. 73 (1947), or by a fellow employee of equal rank, *Besta v. Consolidated Rail Corp.*, 580 F.Supp. 869 (S.D.N.Y. 1984). The railroad has been held liable for a supervisor who assaults and batters a subordinate employee, *Jamison vs. Encarnacion, supra*; *Baker v. Chicago B & O Ry.*, 327 Mo. 986, 39 S.W.2d 535 (1931). Now the Petitioner suggests that since a grievance could be filed by a subordinate employee who is assaulted and battered by his supervisor, the subordinate employee is limited to filing a grievance claim under the RLA. In effect, the railroad argues it would be liable if the worker was assaulted and battered by third persons

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[2] *Jamison v. Encarnacion, supra*, involved an assault and battery by a foreman against his subordinate employee. Comparably this case also involves assaults and batteries by supervisors against a subordinate employee, i.e. Lancaster.

or fellow employees, but that the railroad would be immune for liability if the perpetrators were its own supervisors. The railroad would have its supervisory personnel free to assault and batter its workers and immune from action under the FELA.[3] The injured worker's claim would be restricted by the awards available under the grievance procedure of the RLA to the wages he lost while out of work recovering from the beating [App.14a]. Certainly, there is little common sense in allowing recovery for assaults and batteries perpetrated by those less closely associated with the railroads and not allowing recovery for assaults and batteries perpetrated by those who make up the management of the railroad. Lancaster should not be prevented from receiving the award the jury determined compensated him for his injuries simply because he was unlucky enough to be assaulted and battered by the persons who were to provide order in the workplace, rather than by persons who worked there or by persons who were strangers to it. Petitioner argues for a ridiculous state of the law from an analytically unsound position.

IV. The Plaintiff Has Stated A Cause Of Action Under The FELA If The Plaintiff Has Stated A Claim For "Negligence" As Defined In The FELA.

In support of its petition, the Petitioner argues that the proper analytical approach is to review the RLA, and if you can find a minor grievance nestled somewhere in the facts, then the RLA controls. In support of this approach the Petitioner cites a series of cases in which claims for intentional infliction of emotional distress, retaliatory discharge and wrongful discharge under state law or allegedly under the FELA, have been determined to give way to

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[3] Implicit in the Petitioner's argument is that the reverse is not true. If a supervisor is assaulted and battered by a subordinate employee as a result of the railroad's negligence, the supervisor may still pursue his FELA claim. See *Harrison v. Missouri Pacific Railroad Co.*, 372 U.S. 248, 9 L.Ed. 711, 83 S.Ct. 690 (1963) and *Tatham v. Wabash R.Co.*, 412 Ill. 568, 107 N.E.2d 735 (1952).

the mandatory grievance procedure of the RLA. However, Petitioner fails to observe that in each of the cases cited the principal issue upon which recovery was sought involved interpretation of the collective bargaining agreement. In this case the collective bargaining agreement bears no relationship to the claim presented. It was neither presented nor introduced into evidence at trial [App.13a].

Additionally, this case does not have a minor grievance nestled somewhere in its facts. A minor dispute or grievance involves the interpretation or application of a collective bargaining agreement concerning rates of pay, rules or working conditions. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957). Obviously, Lancaster's rate of pay is not involved and neither are the rules governing Lancaster's employment. In order for the Petitioner to argue that the assaults and batteries were minor grievances, the Petitioner must be relying upon the phrase "working conditions" or this Court's dictum in *Elgin, Joliet & Easter R. Co. vs. Burley, supra*, at page 325 U.S. 723, which stated that "disputes" under the RLA include claims "founded upon some incident of the employment relation or asserted one, independent of those covered by the collective agreement, ..." The types of working conditions commonly negotiated in a collective bargaining agreement concern insurance, break time, sick leave, vacation time, number of men required to do a particular job, seniority rights and pension or retirement rights. Generally one does not expect such agreements to explicitly prohibit supervisors from assaulting or battering their employees. The right not to be physically assaulted or battered has a basis independent of the collective bargaining agreement; it is based in our common law and in our criminal laws. Correspondingly, the duty not to assault or batter an employee should not be limited, as the Petitioner proposes, to the working conditions section of a collective bargaining agreement. Additionally, the duty not to assault

or batter an employee should not be limited by this Court's dictum in *Burley* to the "incidents of the employment relationship". To suggest, as the Petitioner does, that the assaulting and battering of Lancaster involves the interpretation or application of the collective bargaining agreement or is an "incident of the employment relation", and, therefore, must be grieved as a minor dispute both violates the Seventh Amendment to the United States Constitution and asks the arbitrators to do the impossible. It asks the arbitrators to do that which they have no experience or expertise [App.12a]. Arbitrators will be asked to decide issues of respondeat superior, direct negligence, causation or proximate causation and to assess damages for personal injuries. Arbitrators will be asked to give awards for pain and suffering, past and future medical expenses and future lost wages, all of which is beyond their power to do [App.14a]. Traditionally these are issues for the Courts to resolve. The Seventh Circuit Court's opinion is that being assaulted and battered by a supervisor is not a minor dispute or grievance within the meaning of the RLA, but rather is properly subject to FELA jurisdiction.

A FELA claim is founded upon the railroad's negligence. Assuming, in *arguendo*, that Lancaster could have filed a grievance under the RLA is of no importance. Under the Petitioner's argument any worker who is injured by the negligence of the railroad could file a grievance based upon the "working conditions" which gave rise to the railroad's negligence. In other words, there is no way to theoretically distinguish a grievance filed by Lancaster as a result of being assaulted and battered by his supervisor with a grievance filed by Lancaster as a result of being injured by a defective rail car. In each case, under the Petitioner's argument, the employee's ability to file a grievance would result in the employee being limited to a RLA claim. In effect, the RLA would repeal the FELA. Certainly, this is a result which Congress did not intend or mandate.

The obvious solution recognized by both the Seventh Circuit in this case and the Ninth Circuit in *Buell v. Atchison, Topeka and Santa Fe Rwy. Co.*, 771 F.2d 1320 (9th Cir. 1985), Petition for Cert. granted No. 85-1140, is to direct the inquiry to the FELA. If the Plaintiff can state a claim based upon the FELA, then he should not be prevented from proceeding on that claim by the RLA. In the analysis of this issue lies the difference between the Seventh Circuit in this case, *Lancaster v. Norfolk and Western Railway Co.*, 773 F.2d 807 (7th Cir. 1985) and the Ninth Circuit in *Buell*.

The Ninth Circuit in *Buell* viewed the issue as one of whether there is any reason under federal law to limit a railroad employee's right to relief under the FELA for emotional injury. Since the Court concluded there was none, they allowed the case to proceed. The Ninth Circuit did not analyze the case in terms of which torts are encompassed within the definition of "negligence" under the FELA, but rather, in terms of which types of injuries are compensable under the FELA.

The Seventh Circuit in *Lancaster* viewed the issue as one of whether the Plaintiff alleged a tort which was compensable as "negligent" under the FELA [App.11a]. The *Lancaster* Court viewed "physical" torts, such as assault, battery, and negligent infliction of personal injuries, as actionable under the FELA. Since *Lancaster* has established all three such torts in his proof at trial, the Seventh Circuit upheld Lancaster's award. The legal theories, torts alleged and the operative facts are so totally different in *Lancaster* from *Buell* that they are not comparable at any level.

In *Buell v. Atchison, Topeka and Santa Fe Rwy. Co.*, *supra*, the United States Court of Appeals for the Ninth District considered the following issue:

> The question before us is therefore not whether a state law claim is preempted by federal law

> but whether there is any reason under the federal law to limit railroad employee's right to relief under the FELA for emotional injury. We conclude that there is none.

In this case, Lancaster's injury was induced by traditional common law torts, i.e. assault and battery. Unlike *Lancaster*, in the *Buell* case those common law torts, i.e. assault and battery, were not the causation factors of Buell's resulting mental illness.

The *Buell* case and the *Lancaster* case are bottomed upon a basic causation difference:

A. *Buell*: Harassment, threats and intimidation;

B. *Lancaster*: Tortious assaults and batteries.

While the Petitioner attempts to equate the two rulings, there is neither a factual or legal basis to equate these cases.

Negligence implies a duty and a breach of that duty. All the cases cited by the Petitioner for retaliatory discharge, wrongful discharge, and intentional infliction of emotional distress involve actions which were not considered negligent at common law. They have been created more recently and, therefore, it does not necessarily follow that they are "negligent" acts within the meaning of the FELA [App.10a,11a]. For example, at common law an employee was dischargeable at will and any reason, or no reason at all, was sufficient for discharge whether the motive be good or bad. Only recently have courts implied a duty to discharge for reasonable cause or at least a cause not violating public policy and, therefore, established the corresponding tort for breach of that duty. Whether such duty arises and its breach amounts to "negligence" under the FELA is for this Court to consider in an appropriate case. The same analysis applies to the other cases cited by the Petitioner.

The Petitioner is wrong when it implies that the Seventh Circuit's opinion in *Lancaster* conflicts with any of the cases it cites. Indeed, *Lancaster* finally gives a rational and logical basis underlying the reconciliation of all the cases the Petitioner cites.

Lancaster has properly proven a claim for "negligence" under the FELA, which is all that is required to affirm his jury award. Taking this case as the Petitioner suggests or holding it pending *Buell* will not advance this Court's resolution of the issue in *Buell*. However, the Petitioner's argument in this case needlessly interjects an issue that this Court need not reach.

V. Under The Argument Advanced By The Petitioner, The RLA Is Needlessly Brought Into Conflict With The Seventh Amendment To The Constitution Of The United States of America.

The Petitioner's argument that the RLA prevents Lancaster's recovery for his FELA claims brings the RLA in direct conflict with the Seventh Amendment to the Constitution of the United States of America, UNITED STATES CONST., amend. VII. The Seventh Amendment guarantees the right of trial by jury in all cases of common law in which the amount claimed is in excess of $20.00.

At common law an employee could maintain an action against his employer based upon his employer's negligence. Therefore, the FELA does not create the employee's cause of action. However, it does promote it by abolishing several restrictive common law defenses, expanding the definition of negligence and lowering the quantum of proof necessary to establish a claim [App.6a]. To the extent that the RLA would prohibit the employee from recovering his common law claims, it must run afoul of the Seventh Amendment because the RLA does not provide the right of a trial by jury. In this case, assault and battery are claims recognizable at common law. The Petitioner argues that in this case the RLA should prevent Lancaster's constitutional

right of a trial by jury. Such argument needlessly conflicts the RLA with the Seventh Amendment. See Mr. Justice Douglas dissenting in *Andrews v. Louisville & Nashville R. R. Company*, *supra*, at 406 U.S. 320.

As Lancaster has demonstrated in Section IV of his Argument, if this Court determines that all that is necessary to reconcile the two statutes is to determine whether the Plaintiff can properly state an FELA claim, then no conflict arises. In other words, are the events ones which this Court has determined constitute "negligence" within the meaning of the FELA? If all the common law torts of negligent infliction of personal injury, assault and battery are allowed to proceed as FELA claims, then the RLA does not conflict with the Seventh Amendment. Additionally, if the FELA does not include within its definition of "negligence" claims for retaliatory discharge, wrongful discharge or intentional infliction of emotional distress, then finding that these claims are properly matters for determination under the RLA does not conflict with the Seventh Amendment. If the employee has no FELA claim, then he is left only with an RLA claim in the federal regulatory scheme Congress provided. The RLA is not taking something from the claimant which he had, but instead is providing him with some measure of relief where he had none. In reconciling the RLA and the FELA so that the RLA does not conflict with the Seventh Amendment, a review of the Congressional Record is important. A diligent search of the Congressional Record when the RLA was enacted has failed to disclose any Congressional discussion or debate concerning employee injuries, claims under the FELA, or the reconciliation of the RLA to the FELA. Plainly, by its silence, Congress did not intend for the RLA to prevent workers from prosecuting their claims for injuries under the FELA.

Congress did express its intent in favor of allowing an injured employee to present its FELA claim when it enacted Section 55 of the FELA. Section 55 states in part:

> Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void. . . .

Additionally, when construing the RLA, this Court in *Burley* sought to protect the individual worker's rights when it stated at 325 U.S. page 744:

> The collective agreement could not be effective to deprive the employees of their individual rights.

This Court should reconcile the RLA and the FELA by protecting the rights of the individual worker, an intent consistent with both the RLA and the FELA. Reconciliation should be by stating that the RLA does not apply in situations where the workers state a claim for "negligence" as defined by the FELA thereby preserving the individual rights of the workers. So construed, the RLA does not conflict with the Seventh Amendment.

VI. In The Alternative Assuming The RLA Applies To This Case, *Lancaster* Falls Within The *Farmer v. Brotherhood Carpenters & Joiners of America* Exception To The Exclusive Remedy Requirements Of The RLA.

In the event that this Court considers that the RLA applies to this case, then this case comes under the exception to the exclusive remedy requirements of the RLA as set forth in *Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977).

The Seventh Circuit Court, in this case, described Lancaster as follows [App.13a]:

> This case is even stronger for the plaintiff than *Farmer v. United Brotherhood of Carpenters & Join-*

> *ers of America, Local 25*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977). *Farmer* held that the National Labor Relations Act did not preempt a suit under state tort law by a union official who alleged that the union had subjected him to a campaign of threats, personal abuse, and harassment amounting to intentional infliction of emotional distress. Even though a dispute arises out of a labor dispute and could be made the subject of an unfair labor practice complaint to the National Labor Relations Board, state tort remedies survive provided 'that the state tort be either unrelated to employment discrimination [which would have been the unfair labor practice in that case] or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.' *Id.* at 305, 97 S.Ct. at 1066 (footnote omitted). Here the labor dispute is even further in the background; Lancaster was not a union activist or official. We cannot see how allowing the suit to go forward could interfere with the objectives of the Railway Labor Act.

The Seventh Circuit Court of Appeals found that the Defendant's actions are far more "outrageous" in this case than those of the Defendant in *Farmer* [App.14a]. Under the test in *Farmer*, Lancaster's claim should be allowed to stand even if the RLA applies.

CONCLUSION

For the foregoing reasons, it is obvious that this case does not bring before this Court the issue the Petitioner raises. Both the District Court and the Seventh Circuit Court of Appeals reached a decision based upon well-settled law, and there is no question for resolution by this Court. The Petition should be denied.

Respectfully submitted,

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